Filed 3/9/10 Roche v. Lang CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WARREN W. ROCHÉ, Plaintiff and Appellant, v. ERIK E. LANG, Defendant and Respondent.	B214622 (Los Angeles County Super. Ct. No. SC038761)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry B. Friedman, Judge. Affirmed.

Warren W. Roché, in pro. per., for Plaintiff and Appellant.

Erik E. Lang, in pro. per., for Defendant and Respondent.

Appellant Warren W. Roché filed this defamation action against respondent Erik E. Lang. Lang asked the trial court to strike Roché's action because it is a Strategic Lawsuit Against Public Participation (SLAPP). The trial court agreed, and dismissed Roché's lawsuit. We affirm.

FACTS

This is the third appeal we have entertained from Mssrs. Lang and Roché. As described in a prior opinion, they "are litigious, hostile neighbors in Topanga Canyon."[1] The passage of years has not diminished the parties' mutual antipathy.

Background

Lang purchased real property from Roché in Topanga Canyon in 1977. The two men resided "within eyesight" of each other, and Roché has had Lang's mailing address since 1977. Roché sued Lang twice before—in 1989 and 1991—using Lang's correct mailing address. (*Lang 2*, pp. 2-3.)

In 1995, Roché filed this defamation action against Lang. Despite being Lang's neighbor and having Lang's mailing address, Roché claimed that he was unable to serve the summons and complaint on Lang. Instead, Roché served notice by newspaper publication on "Eric Lang." In 1996, Roché obtained a default judgment against "Eric Lang." (*Lang 2*, pp. 2-3.) This is a misspelling of respondent's given name, which is "Erik."

Lang first learned of this lawsuit in 2003, when Roché obtained a writ of execution to collect on the $50,446 default judgment. (*Lang 1*, p. 4; *Lang 2*, p. 3.) Upon learning of the existence of this lawsuit—and the default judgment Roché had obtained—Lang instituted an independent action in equity to set aside the default, based on Roché's

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[1] *Lang v. Roche* (Jul. 27, 2005, B176388) [nonpub. opn.] (*Lang 1*), page 2. A second appeal was decided two years later, *Lang v. Roche* (May 16, 2007, B192213) [nonpub opn.] (*Lang 2*). All citations to these two appeals are to the slip opinions. We take judicial notice of our opinions in *Lang 1* and *Lang 2* because they are related prior proceedings leading to the present appeal. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 401.)

failure to properly serve the summons and complaint in accordance with the law. Lang's efforts to void the default judgment spawned the appeals in *Lang 1* and *Lang 2*.

Ultimately, in July 2008, the trial court vacated the default judgment.[2] After the default judgment was vacated, Roché served the summons and complaint, on August 26, 2008, and this lawsuit recommenced.

The Alleged Libel

In his complaint, Roché alleges that he was libeled by a 14-page "Statement" published on or about March 10, 1995, which is attached as an exhibit to his complaint. Roché does not specify in his complaint what portions of the lengthy "Statement" are defamatory. The "Statement" commences with these words: "7. DESCRIBE IN DETAIL HOW DAMAGE OCCURRED? This claim is based on three subject matter areas . . . ."

The "Statement" describes a 23-year-long "conspiracy to commit land use fraud" perpetrated by Roché and a Los Angeles County building and safety department official named Lawseth. Lawseth allegedly permitted Roché to build an excessive number of units on his property, in violation of zoning ordinances, while preventing Lang from building anything on his adjoining property in Topanga Canyon. In addition, Roché built speed bumps and dumped soapy laundry water into the street, which the "Statement" characterized as "road theft." Roché had disputes with the local homeowners' association, which resulted in litigation and complaints filed with government authorities, including the fire department and county supervisor. Roché also had disputes with Lang. Roché and Lawseth supposedly conspired to have Lang cited for code violations, and subverted the development plans that Lang submitted to the county for approval.

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[2] While Lang was making his due process challenge to the validity of the default judgment, Roché executed on the judgment and Lang's real property in Topanga Canyon was sold at a Sheriff's sale.

The Anti-SLAPP Motion

On October 3, 2008, after being served with the summons and complaint, Lang filed a notice to strike this lawsuit on the grounds that it is a SLAPP. Lang asserts that the allegedly defamatory "Statement" is part of a claim for damages that he filed with the County of Los Angeles on March 15, 1995. Lang argues that the allegations in the complaint "arise entirely out of defendant's actions in furtherance of his exercise of his constitutional right to freedom of speech and to petition for the redress of his grievances on a 'public issue or an issue of public interest.'" He further maintains that the statements made in his government claim are absolutely privileged.

In his response to Lang's motion to strike, Roché does not deny that the "Statement" is a claim for damages that Lang submitted to the county government. Roché concedes that his lawsuit arises from Lang's First Amendment activity. Roché argues that the "Statement" accuses him of various crimes including perjury, fraud, building code violations, falsification of building permits, illegal rentals of property, theft, and alteration of evidence, making it libelous per se.

In a declaration, Roché points out that he prevailed against Lang and other defendants in a 1989 lawsuit for libel, arising from an "open letter" distributed by the neighborhood homeowners' association, which accused Roché of wrongdoing with respect to the development of his property. Apart from the prior lawsuit, Roché observes that he obtained a default judgment in this lawsuit in 1996: "In order to get the default judgment, I was required to testify at the default prove-up hearing. The issuance of this default judgment shows that I proved sufficient, admissible evidence on all elements of my claim." Roché does not offer a transcript of his testimony at the prove-up hearing as evidence of the merits of his claim.

The Trial Court's Ruling

The trial court granted Lang's motion to strike the complaint on January 8, 2009. The court concluded that "Plaintiff fails to offer evidence to meet his burden of showing a probability of prevailing on the merits." The court noted that Roché did not provide the transcript of the prove-up hearing as evidence that his claims have merit. The court later

denied Roché's motion for reconsideration because "Plaintiff simply reargues the Motion to Strike on the ground that the Court's ruling was in error. There is no basis to grant the Motion." Roché timely filed his notice of appeal on March 2, 2009.

DISCUSSION

1. Appeal and Review

Appeal lies from the order granting Lang's motion to strike the complaint under the anti-SLAPP statute. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13).)[3] The court's ruling on the motion is subject to de novo review. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245.)

2. Overview of the Anti-SLAPP Statute

The anti-SLAPP statute is aimed at curbing "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735, 738-739.) It applies to "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).)

There are two components to a motion to strike brought under section 425.16. First, the defendant must make a threshold showing that the claim arises from an act in furtherance of the defendant's constitutional right to petition or to free speech. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the lawsuit affects a protected right, the court determines whether there is a reasonable probability that the plaintiff will prevail on the claim. (§ 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76*; Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

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[3] All future statutory references in this opinion are to the Code of Civil Procedure, unless otherwise indicated.

3. Application of the Anti-SLAPP Statute to This Case

a. Threshold Showing that the Lawsuit Arises from Protected Activity

The trial court's minute order states, "The parties agree that Defendant's acts were taken in furtherance of his constitutional right of free speech in connection with a public issue." Roché concedes in his appellate brief that Lang has satisfied the threshold showing that the lawsuit arises from protected activity.

b. Probability of Prevailing on the Merits

To defeat a motion under section 425.16, once a threshold showing is made that the lawsuit arises from protected activity, the plaintiff bears the burden of demonstrating a probability of success on the merits of his claim. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) To establish that his claim has merit, plaintiff "cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527.) There must be "'"a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 93.)

"Libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) An essential element of libel is that the publication must contain a false statement of fact; statements of opinion are not actionable. (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1353-1354.) When the plaintiff is a private individual (as opposed to a public figure), he must prove that the false statement was negligently made. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 742; *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1015-1016.) If the plaintiff claims that a statement is libelous on its face and does not require any explanatory matter, as Roché does here, the defamatory language "is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." (Civ. Code, § 45a.) "Special damages" are those that plaintiff "alleges and proves that he has suffered in respect to his

property, business, trade, procession or occupation . . . and proves he has expended as a result of the alleged libel." (Civ. Code, § 48a, subd. 4(b).)

In this case, Roché submitted no admissible evidence demonstrating a probability of success on the merits of his libel claim. Roché failed to specify in his declaration what elements of Lang's 14-page government claim are libelous on their face. Some of the statements are obvious hyperbole. For example, accusing Roché of "road theft" is a crime that does not exist. Nor did Roché offer proof that these statements are false and negligent. For example, Lang's government claim references Roché's numerous illegal multiple rental units; however, the jury in a prior libel case found that Roché did, in fact, build "illegal multiple rental units" that violate zoning laws. In addition, Roché was found to be in violation of the zoning laws in a separate action brought against him by the government. Further, although Roché alleged in his complaint that his real estate business was damaged in the sum of $50,000 by Lang's statements, he offered no admissible proof of these "special damages." Without that proof, his claim "is not actionable." (Civ. Code, § 45a.)

Roché elected to rely on the 1996 default prove-up hearing. His declaration states, "I proved sufficient, admissible evidence on all elements of my claim" at the prove-up hearing; on appeal, Roché continues to argue that "having made the required showing during the default prove-up in this action, Roché should not have been required to make this showing a second time." The problem is, Roché did not offer his testimony from the prove-up hearing into evidence. The default judgment was erased after the trial court found that Lang was not properly served with the summons and complaint. The judgment is void ab initio, and we cannot consider it for any purpose. The only use Roché can make of the default prove-up hearing is the transcript of his sworn testimony.

The trial court properly found that without the reporter's transcript of Roché's testimony, there is no admissible evidence of the merit of Roché's claims that is sufficient to defeat Lang's motion to strike. We have examined the matters that were judicially noticed by the trial court: none of the material establishes a prima facie case of libel, and Roché does not direct our attention to what (among the 359 pages of material

from prior judicial proceedings submitted by Roché) is relevant to proving his case, other than the void and unusable 1996 default judgment.

Lang correctly argues that statements made in a claim presented to the government are subject to an anti-SLAPP motion because they are protected by the litigation privilege. "'[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) . . . such statements are equally entitled to the benefits of section 425.16.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) "The litigation privilege is also relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.)

The absolute privilege afforded by Civil Code section 47 encompasses communications to administrative bodies and government agencies whose function is to investigate and remedy alleged wrongdoing. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.) It applies to all publications made in preparation of litigation, regardless of their maliciousness. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) This includes communications to government officials, which may precede the initiation of formal proceedings. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 365; *Garamendi v. Golden Eagle Ins. Co.* (2005) 128 Cal.App.4th 452, 478.) The statements made in Lang's government claim come within the absolute privilege afforded by Civil Code section 47, because the claim is a prerequisite to filing a civil action pursuant to the Government Claims Act. (Gov. Code, § 815 et seq.)

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.